

Neshaminy Electrical Contractors, Inc. and International Brotherhood of Electrical Workers, Local Union 269, AFL-CIO. Case 4-CA-29716

August 8, 2001

DECISION AND ORDER

**BY CHAIRMAN HURTGEN AND MEMBERS
LIEBMAN AND WALSH**

On April 13, 2001, Administrative Law Judge Margaret M. Kern issued the attached decision. The Charging Party filed exceptions and a supporting brief. The Respondent filed a brief in opposition to the Charging Party's exceptions, and the Charging Party filed a brief in reply.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Michael C. Duff, Esq. and Noelle Reese, Esq., for the General Counsel.

Raymond A. Kresge, Esq., for the Respondent.

Richard Aicher, for the Charging Party.

BENCH DECISION

STATEMENT OF THE CASE

MARGARET M. KERN, Administrative Law Judge. This case was tried before me in Philadelphia, Pennsylvania, on March 19 and 20, 2001. The complaint, which issued on September 27, 2000, was based on an unfair labor practice charge filed on August 22, 2000, by the International Brotherhood of Electrical Workers, Local Union 269, AFL-CIO (the Union) against Neshaminy Electrical Contractors, Inc. (Respondent). It is alleged that on August 18, 21, and 22, 2000,¹ Respondent violated Section 8(a)(1) of the Act by creating the impression

¹ The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² We adopt the judge's recommended dismissal of the complaint allegation that the Respondent unlawfully discharged Joseph Rearick on August 22, 2000. In doing so, we rely on her dispositive finding that the record fails to establish that Rearick was, in fact, discharged. Consequently, we find that it is unnecessary to pass on the judge's analysis under *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1981), cert. denied 455 U.S. 989 (1982).

³ All dates are in 2000 unless otherwise indicated.

of surveillance of employee Joseph Rearick's union activities and by suggesting to Rearick he should resign his employment because of his union sympathies. It is further alleged that Respondent violated Section 8(a)(3) and (1) of the Act by suspending Rearick on August 21, and by discharging him on August 22.

At the conclusion of the hearing, I issued a bench decision pursuant to Section 102.35(a)(10) of the National Labor Relations Board's Rules and Regulations. I certify that my decision was accurately reproduced at pages 275 through 294 of the transcript, attached as an appendix.²

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not engaged in unfair labor practices as alleged in the complaint.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended³

ORDER

The complaint is dismissed.

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APPENDIX

ADMINISTRATIVE LAW JUDGE KERN: On the record.

Good morning, everyone. This is a continuation of a hearing in the matter of Neshaminy Electrical Contractors, Inc., Case Number 4-CA-29716. Let the record show that counsel are present.

I'm prepared to issue my decision in this case.

BENCH DECISION

This case was tried before me in Philadelphia, Pennsylvania, on March 19th and 20th, 2001. The complaint, which issued on September 27, 2000, was based upon an unfair labor practice charge filed on August 22, 2000, by the International Brotherhood of Electrical Workers, Local Union 269, AFL-CIO, herein called the Union, against Neshaminy Electrical Contractors, Inc., herein called the Respondent.

It is alleged that on August 18, 21, and 22, 2000,¹ Respondent violated Section 8(a)(1) of the Act by creating the impression of surveillance of its employee's Union activities and by suggesting to employee Joseph Rearick that he should resign his employment because of his Union activity.

² I have corrected the transcript by making physical inserts, cross-outs, and other obvious devices to conform to my intended words without regard to what I may have actually said in the passages in question.

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹ All dates are in 2000 unless otherwise indicated.

It is further alleged that Respondent violated Sections 8(a)(3) and (1) of the Act by suspending Rearick on August 21, 2000, and by discharging him on August 22, 2000.

For the reasons set forth herein, I recommend that the

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complaint be dismissed.

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2) (6) and (7) of the Act. Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II.

A. Background

Respondent is engaged in the business of heavy industrial and commercial electrical installation in and about the State of Pennsylvania. John Lyons is Respondent's president, part owner, and an admitted supervisor and agent within the meaning of the Act. Dennis Morrin is Lyons' partner and a part owner.

Respondent employs approximately 130 electricians. Respondent maintains an office and shop in Bensalem, Pennsylvania. Employees generally report to the shop each morning. A large board with magnetic name tags shows the job and truck to which employees are assigned, and they then travel to their respective job sites. The assignment of employees to job sites is managed by Morrin.

B. Rearick's Employment History

John Rearick was hired by Respondent in May 1997 as an electrician's helper. His wife at the time, Frances Rearick, worked for a customer of Respondent and she asked Lyons to hire her husband. At the time he was hired, Rearick had no

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electrical experience. His starting rate of pay was \$10 per hour and during the course of his employment he received three or four raises bringing his final rate of pay to \$15 per hour.

According to Lyons, for the most part, Rearick was a good worker who advanced from the helper position to a more qualified electrician. Had he remained in Respondent's employ, according to Lyons, Rearick would have continued to receive the same raises as other employees.

There were, however, some problems with Rearick's work and he was disciplined for three separate incidents. The first incident occurred in the latter part of 1999 or early 2000 at a job site in Mansfield. The foreman on that job was Jake Murphy. Rearick failed to use proper strapping materials to secure ceiling cable and, as a result, Respondent failed a daily inspection.

Shortly thereafter, in January 2000, Rearick was observed driving onto a job site with his personal truck. He was late arriving to work, hit a curb with his truck, and knocked over a newly installed sign. Lyons testified that this conduct was observed by the owner of the project who ordered Rearick off the site. As a result of these two incidents, Rearick received a written warning on January 21.

The third incident occurred in March when Rearick, along with three other employees, were written up for leaving

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unattended tools and trash in a company vehicle. According to Lyons, none of these incidents, either singularly or collectively, warranted Rearick's termination.

Craig Berdomas is a foreman who was assigned to a job site in Jackson, New Jersey. According to Berdomas, Rearick had been assigned to this job site from time to time in 2000. Berdomas did not consider Rearick to be a particularly good worker and he found him very short-tempered and difficult to pair up with other employees. He nevertheless worked with Rearick whenever he was assigned to the Jackson site.

In August Rearick was assigned to a job site in Villanova. Lyons testified that the general contractor on the job complained that he saw Rearick talking on his cell phone during working time. The general contractor advised Respondent that he was not going to pay for Rearick to be on his cell phone all day. As this was a job billed on a time and materials basis, Rearick was assigned to the Jackson job, which was a contract price job.

Rearick's last day on the Villanova job was Wednesday, August 16. Rearick did not report for work on Thursday, August 17, and on Friday, August 18, Rearick was assigned back to the Jackson job site under Berdomas' direction.

C. Rearick's Union Activity

Rearick testified that in July 1999 he became interested in joining the Union and he met with Richard Aicher, an

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assistant business manager and organizer. At about the same time as this initial contact with the Union, Rearick separated from his wife, Frances, and it appears by all accounts that this was an acrimonious dissolution.

After meeting with Aicher, Rearick decided that he did not want to get further involved with the Union. Seven months later, however, in February, Rearick again contacted the Union because he felt he was being treated unfairly on the job. This time he met with another assistant business manager and organizer, Tom Bates. Rearick agreed during the course of his meeting with Bates to become a volunteer organizer.

According to both Rearick and Bates, from February to August, Rearick called Bates on a weekly basis. He gave Bates the location of job sites he was working on, and the names, addresses, and telephone numbers of fellow employees. Rearick did not at any time, distribute authorization cards although he himself signed a card in April.

Bates testified that in mid-August, the decision was made by the Union business manager that Rearick should no longer maintain a passive information-gathering role, but rather Rearick should reveal his identity to Respondent as a Union organizer. According to Bates, in order to effectuate Rearick's coming out into the open as a Union organizer, he gave Rearick literature to distribute to employees. Rearick

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testified that he received that literature on Thursday, August 17, the day after he was removed from the Villanova job and the day before he was assigned to the Jackson job.

At about the same time that the decision was made for Rearick to assume a more active, public role in organizing Respondent's employees, Lyons testified that he met with Rearick. According to Lyons, employees had come to him saying Rearick was unhappy and thinking of quitting. Lyons told Rearick that if he was unhappy and had something to say to him, Rearick should come in and talk to him himself and not send other employees to speak for him. According to Lyons, Rearick said okay. This conversation, according to Lyons, took place about a week before August 18, and there was no reference to the Union. Rearick did not testify regarding this conversation.

D. The Events of August 18th

On the morning of Friday, August 18, Rearick and Berdomas had a one-on-one conversation at the Jackson job site. According to Rearick, Berdomas approached him and said he wanted to give Rearick a heads up. He said that Rearick was under a microscope and that everything he did was being watched. Rearick asked Berdomas why and, according to Rearick, Berdomas said he didn't know why but "somebody must have said something."

Berdomas testified that on the morning of August 18, he

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was told by Morrin that Rearick was being assigned to Jackson and that Berdomas should make sure that he stayed busy. Berdomas met with Rearick at the job site and said, "Joe, I don't know what you did, but I'm to make sure that you're busy all day." Rearick asked Berdomas what that was supposed to mean and Berdomas responded that they, referring to management, wanted Berdomas to keep an eye on him. Berdomas told Rearick just to do his work and that he would go back and tell Morrin that he did his work and give him a good report. Rearick's response to this was to tell Berdomas that he was tired of this, "fucking shit," and that he knew that it was Jake Murphy who was accusing him of poor work performance.

According to Berdomas, Rearick continued to yell about the incident involving crashing his personal vehicle and about being sent home. Berdomas told Rearick that he didn't really care about these incidents, to just have a good day at work. Berdomas assigned Rearick to a specific job and checked on him perhaps once that day but no more frequently than he checked on other employees.

According to both Rearick and Berdomas, at no time was there any mention of the Union during the course of their conversation on August 18. Berdomas testified he was told by Morrin to watch Rearick because his production was down and there was no reference by Morrin to the Union. Morrin did not testify.

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Rearick testified that following his conversation with Berdomas, he distributed Union literature to approximately eight

employees during the lunch break. He could not recall the name of any employee to whom he gave the literature and the literature was not introduced in evidence.

E. The Events of August 21

Rearick reported to the shop at his usual time around 5 a.m. He approached Lyons and asked why he was being watched. Lyons told Rearick to come into his office and Rearick complied. No one else was present for the conversation that followed.

According to Rearick, he asked Lyons why he was under a microscope. Lyons said it was obvious that Rearick was unhappy working for Respondent, and that a couple of employees had come to him and told him they were uncomfortable with Rearick's conversations on the job. Rearick testified that Lyons told him that about a year ago Rearick's wife, Frances, had called Lyons and told him that Rearick was involved with the Union. Rearick responded by telling Lyons to please stop playing games with him and if he was going to fire him, to just fire him. Lyons said he had no reason to fire him, but that if Rearick wanted him to lay him off, he would. Lyons said Rearick was a good worker and other employers would hire him. According to Rearick's version on direct examination, Lyons said that he should "take a day or two" and see if he wanted to continue to work for

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Respondent, and to let Lyons know. Rearick also testified that his understanding of Lyons' statement, "to take a day or two" meant to go home. Rearick testified he did not think he was suspended when Rearick made this statement, but he did take it to mean he should go home. On cross examination, however, he testified Lyons told him to go home. Rearick did not report to the Jackson job site that day. He did, however, telephone Bates and relayed the substance of his conversation with Lyons.

Lyons' version of the conversation in the office is that Rearick said he did not like being watched and he did not like being moved from job to job. Lyons said that Morrin schedules the men, and that Rearick was being assigned to Jackson where he was needed. At that point, Rearick said, "why don't you fire me or lay me off." Lyons said he had no reason to fire him or lay him off, that, in fact, he needed him. Rearick again said that Lyons should fire him or lay him off. Lyons said he would not do that. He said he knew that Rearick was unhappy and that he should work the week, and if he didn't want to continue to work he could go elsewhere. Rearick responded by saying he knew that this all started when Frances told Lyons about Rearick's being in the Union. Lyons responded that he had known for a year that Rearick was involved with the Union because, in fact, Frances had told him so. But he pointed out to Rearick that he was still employed a year later and he didn't care about the Union. Rearick said he wasn't in the Union and Lyons said fine. They shook hands. Rearick did not

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say he was not going to report for work and when he left, it was Lyons' understanding that he was enroute to the Jackson job site. Lyons denied telling Rearick to take a few days off. He testified he said just the opposite, that Rearick should continue

to work the week and think about whether he wanted to continue to be employed.

At approximately 4:50 p.m. on the afternoon of August 21, Bates faxed a letter to Lyons stating, "please be advised your employee, Joseph Rearick, is a volunteer Union organizer engaged in organizing activities protected by the National Labor Relations Act."

Lyons acknowledged receiving this letter that afternoon. He also admitted that he was angered by the fact that Rearick had taunted him that morning by repeatedly asking Lyons to fire him or lay him off, which Lyons would not do, and then denied having any involvement with the Union.

F. The Events of August 22

Rearick again reported to the shop at his usual time of 5 a.m. According to Rearick, as he approached the door to enter, Lyons opened the door and stood in the doorway. He looked directly at Rearick and made a motion with his hand as if he were waving goodbye. In a screaming voice, he called Rearick a fucking liar. Rearick asked what he was talking about and Lyons shoved the Union's letter in his face, saying,

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"here, you fucking idiot, the guys tried to warn me but I didn't listen." Lyons continued that the Union could file all the lawsuits it wanted and that the Union would chew Rearick up and spit him out. He added, "this was the best God damned job you ever had." Rearick got into his truck and left and never returned to work again. He testified that he construed Lyons' words and actions to mean that he was terminated.

According to Lyons' version, he saw Rearick approaching the door that morning and he retrieved the Union's letter from the afternoon before and held it in his hand. He met Rearick at the door and extended his hand toward Rearick, holding the letter, and called him a fucking liar. According to Lyons, Rearick took the paper from his hand and repeated, "what's this, what's this." He then backed up toward his truck. Lyons said "this is the best job you have, the Union is going to spit you out." He said the Union could file all the NLRB suits it wanted and added "this is a good job, I don't know what your problem is." Rearick asked what Lyons was going to do to him and Lyons did not respond. Lyons denied in his testimony telling Rearick that he was fired. He denied waving or making any gesture indicating that he was saying goodbye. He did not physically push or hit Rearick. According to Lyons, when Rearick arrived that morning, his name was still on the board to be assigned to the Jackson job site and Lyons considered him an active employee.

G. The Events Following August 22

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Rearick did not report to the Jackson job site on August 22 or 23 and he testified that by August 23 or 24, the Union had gotten him another job.

On August 23, Lyons addressed a letter to Rearick which read, in relevant part, "On both Tuesday, August 22 and today, you did not report to work for your assigned job on the Jackson, New Jersey project, nor did you call in your absences. The

Company still has you on its payroll and considers you to be an active employee. However, given your recent absences without call-in, the Company does not know whether or not you have quit your job. Should you desire to remain an employee of the Company, please report to work on the first day after your receipt of this letter or at least call with an explanation of your absences. Should you not report to work or call with an explanation by August 29, 2000, the Company will treat you as having abandoned your job and will process you as a quit."

This letter was mailed the same day that it was dated, August 23, and it was sent certified mail, return receipt requested to Rearick's last known address, 508 Society Place in Newtown, Pennsylvania. Two days later, on August 25, Rearick's paycheck was sent to the same address.

Unbeknownst to Respondent, in or about June, Rearick had

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moved from the Society Place address to 3609 Genesee Place in Philadelphia. Rearick had not informed Respondent of this change. The envelope containing the paycheck, which was mailed on August 25 and addressed to the Society Place address, was forwarded by the postal service to Rearick's Philadelphia address. Rearick acknowledged receipt of the check and he, in fact, cashed it. Rearick denied, however, ever receiving the August 23 letter which offered to keep his job available until August 29. According to Rearick, this letter was not forwarded to his new address.

The August 23 letter, as indicated, was sent certified mail, return receipt requested. Sometime in the first week of September, Lyons received the letter back from the post office, undelivered. Numerous red ink stamps appeared on the face of the envelope indicating addressee unknown. However, handwritten on both the front and back of the envelope are the words, "Fwd 3609 Genesee Pl, Phila. PA." The letter was never signed for even though Rearick testified that he continued to live at the Philadelphia address until in or about the end of September.

Lyons' uncontradicted testimony is that he maintained medical insurance coverage for Rearick through the latter part of September.

III. ANALYSIS

Resolution of the issues in this case turns almost entirely on credibility. I have considered the testimony of the witnesses including their demeanor on the witness stand and

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I conclude that Rearick was a less than candid witness. I do so for several reasons.

First, important aspects of Rearick's testimony were impeached on cross examination and by two pretrial affidavits. In his testimony at trial, Rearick contradicted himself. On direct examination he testified Lyons told him to take a day or two; on cross examination he said Lyons said to take a day or two off. His pretrial affidavits reflect the same inconsistency. In an affidavit given to the Union on August 22, Rearick stated Lyons told him to take a day or two off. In an affidavit given a week later to a Board agent, Rearick stated Lyons told him to think about whether he wanted to continue to work "and let him

know in a day or two.” Rearick conceded on cross examination that he was not suspended on August 21.

Second, Rearick’s inability to recall the name of a single employee to whom he allegedly distributed Union literature to on August 18 was disturbing. As a result of this memory lapse, not a single person testified, or could be called to testify, to corroborate Rearick’s account that he, in fact, did hand out literature that day. Neither Aicher nor Bates saw Rearick distribute the literature, which I again note was not introduced in evidence.

Third, Rearick’s demeanor on the witness stand demonstrably changed between direct and cross-examination. One measure of credibility is the consistency with which a witness answers questions on both direct and cross. While Rearick was

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calm and forthright on direct examination, when questioned by Respondent’s counsel, he became defensive, argumentative, and hostile. He several times looked askance at counsel, was sarcastic and smiled in a condescending fashion. This was particularly apparent when he was confronted with the inconsistencies in his affidavits.

In sum, I found Rearick to be not credible and his testimony not trustworthy or reliable. In contrast, I found both Berdomas and Lyons to be far more credible and believable. Unlike Rearick, Berdomas and Lyons testified with equanimity on both direct and cross-examination. I was impressed with Lyons admitting the fact that he was angered by Rearick’s having misrepresented his involvement with the Union and that he called Rearick a liar on the morning of August 22. This testimony was clearly not in Respondent’s interest and Lyons’ willingness to admit to these facts enhanced his credibility in my view. His uncontradicted testimony is that he has hired Union electricians in the past, and the fact that an employee is a Union member does not disqualify him for employment with Respondent.

Berdomas was called initially as a witness for the General Counsel to establish Berdomas’ status as Respondent’s agent. Berdomas answered the General Counsel’s questions candidly and completely. When questioned by Respondent’s counsel, he

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maintained the same straight-forward demeanor. In short, Berdomas and Lyons were simply believable witnesses.

Although Aicher and Bates were generally credible witnesses, they were not present for any of the critical conversations in this case and, thus, their testimony does not aid in the resolution of what was said in the one-on-one conversations between Rearick and Berdomas, and Rearick and Lyons.

The credible testimony of Lyons therefore establishes that Respondent had knowledge of Rearick’s interest and involvement with the Union for approximately a year prior to his discharge, this the result of a conversation between Rearick’s estranged wife and Lyons. Indeed, in Rearick’s affidavit given to the Board, he stated, “My wife and I have been separated in June of 1999 and in the process of an unfriendly divorce. I believe she informed Lyons of my Union activity to get me in trouble with my boss.”

In the year following Respondent’s acquisition of this knowledge, there was no expression of animus towards his Union sympathies. Significantly, from 1999 to 2000, there were three incidents in which Rearick was disciplined. One involved poor work performance and two involved misbehavior on or involving company property. None of these incidents was used as justification to terminate Rearick. Indeed, Rearick was considered by Lyons for the most part to be a good employee to

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whom he continued to give customary raises.

The credible evidence establishes that on August 16, Rearick was taken off the Villanova job site because he had been observed by the owner of the site talking on his cell phone during work time. The credible evidence further establishes that on the morning of August 18, Berdomas was told by Morrin to make sure he got a full day’s work out of Rearick. It is true that Berdomas testified that he thought this request somewhat odd, but I credit his testimony that Morrin made no reference to the Union in giving Berdomas this instruction, and I further credit Berdomas’ denial that he was aware of Rearick’s Union activities. I credit Berdomas’ testimony that when he told Rearick that he was being watched and that if he put in a good day’s work he would give a good report to Morrin, Rearick’s reaction was to complain that he was being accused of poor work performance by foreman Jake Murphy. I credit him that there was no mention whatsoever of the Union. Berdomas’ statement referred to work-related issues and I find, based on Berdomas’ credible testimony, that Rearick understood his statement to refer to work-related issues.

I, therefore, find the evidence fails to establish that on August 18 Berdomas created the impression that Rearick’s Union activities were under surveillance and I recommend dismissal of that portion of the complaint.

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The credible evidence further fails to establish that on August 21, Lyons created the impression of surveillance by telling Rearick that employees had reported to him of conversations they had with Rearick. It fails to establish that Lyons suggested Rearick resign and seek employment elsewhere, and it fails to establish that Lyons told Rearick not to report to work for a few days. I credit Lyons testimony that he never made these statements, that he, in fact, encouraged Rearick to continue working, and to give himself more time to reflect on whether he wanted to continue to work for Respondent in view of the fact that he was unhappy his work assignments. By Rearick’s own admission, he did not think he was suspended on August 21. I, therefore, recommend dismissal of those allegations in the complaint.

Finally, the credible evidence fails to establish that Lyons discharged Rearick on August 22. I do find that Lyons did angrily and forcefully call Rearick a liar. He did make the statement that the Union would chew Rearick up and spit him out, and he did say words to the effect that this was the best job Rearick would ever have. I discredit Rearick’s testimony that Lyons made the non-verbal gesture of waving goodbye, and I

discredit the suggestion that Lyons physically blocked Rearick from entering the premises. The credible evidence is that when Rearick was shown the Union's letter, he got into his truck and drove away.

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In *MDI Commercial Services*, 325 NLRB 53 (1997), the Board set forth the standard that is to be applied under these circumstances. The test of determining whether an employer's statements constitute an unlawful discharge depends on whether they would reasonably lead the employees to believe that they had been discharged, and the fact of the discharge does not depend on the use of formal words of firing. It is sufficient if the words or actions of the employer would logically lead a prudent person to believe his tenure has been terminated.

Lyons' words fell far short of termination. And I find that Rearick's failure to thereafter report to work was of his own volition. I further find, based on Lyons' August 23 letter, that Rearick's job was available to him until August 29. It is significant that Lyons wrote this letter prior to his receipt of the unfair labor practice charge in this case. Based on all these circumstances, I recommend dismissal of that portion of the complaint alleging Rearick's unlawful termination.

In all cases alleging a violation of Section 8(a)(3) or violations of 8(a)(1) turning on employer motivation, the General Counsel is required in the first instance to make a prima facie

showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. Once this is established, the employer has the burden to demonstrate that the same action would have taken

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place even in the absence of the protected conduct. *Wrightline, a Division of Wrightline, Inc.*, 251 NLRB 1083 (1980), enf'd, 622 F.2d 899 (1st Cir. 1981), cert denied 455 US 989 (1982), approved in *NLRB Transportation Management Corp.*, 462 US 393 (1983).

In this case, I conclude that the General Counsel has failed to make out a prima facie case of unlawful discrimination since I find that Rearick was not suspended on August 21 and was not discharged on August 22. Rather, I find, as contended by the Respondent, that Rearick abandoned his employment and was employed at another job, obtained through the Union, by the very next day or day after.

I therefore recommend that the complaint be dismissed in its entirety. I will issue my final conclusions of law in a written decision, which will follow. Thank you.

MR. DUFF: Thank you, Your Honor.

JUDGE KERN: The hearing is closed.

(Whereupon, at 11:00 a.m., the hearing in the above-entitled matter was concluded.)